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In The

Supreme Court of the United States

October Term, 1946

No. 270

INDUSTRIAL COMMISSION OF WISCONSIN,
LEO THOMAS KOPP, and
STATE OF WISCONSIN,

Petitioners,

vs.

E. E. McCARTIN and CONTINENTAL CASUALTY COMPANY, a Corporation.

BRIEF OF PETITIONERS

JOHN E. MARTIN,
Attorney General of Wisconsin,

MORTIMER LEVITAN,
Assistant Attorney General of Wisconsin, Counsel for Petitioners, Industrial Commission of Wisconsin and State of Wisconsin.

LEO THOMAS KOPP,
Pro Se.

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vs.

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BRIEF OF PETITIONERS

The Opinion of the Court Below

The opinion of the Wisconsin Supreme Court is reported in 248 Wis. 570, and is also printed in full in the record (R. 181-186).

Jurisdiction

The jurisdiction of this Court is invoked under sec. 237(b) of the Federal Judicial Code (28 U. S. C. § 344 (b)). The State Court has decided a federal question in a way probably not in accord with applicable decisions of this Court, and has decided a federal question of substance not

theretofore determined by this Court (Supreme Court Rule 38 (5) (a)). The date of the judgment to be reviewed is April 12, 1946 (R. 180).

Statement of the Case

This case involves the question of whether under the full faith and credit clause of the Federal Constitution an award of workmen's compensation made in Illinois (where the contract of employment had been entered into) pursuant to a settlement agreement between employee and employer which expressly stated that it was not to affect any rights that the employee might have under the Wisconsin Compensation Act, precluded all recovery under the Compensation Act of Wisconsin (where the injury occurred).

There is no dispute as to the facts. Leo Thomas Kopp, who resided at Rockford, Illinois (R. 134, 135), had worked as a bricklayer (R. 134) in Illinois for E. E. McCartin (R. 135), a contractor who was an Illinois resident (R. 147, 148). Pursuant to a contract made in Illinois (R. 135, 141, 142, 144), Kopp agreed to work for McCartin on a building job at Beloit, Wisconsin (R. 135). The job lasted about ten months (R. 135, 142, 144), during which time Kopp drove back and forth between Beloit and his home in Rockford (R. 142). On May 5, 1943, while working for McCartin on the Beloit job (R. 134), Kopp suffered an injury to his left eye (R. 133, 134). It was admitted that McCartin was subject to the Wisconsin Compensation Act (R. 134).

On June 7, 1943, Kopp filed an application for adjustment of claim with the Wisconsin Industrial Commission

(R. 115-116). On July 20, 1943, he filed an application for adjustment of claim with the Illinois Industrial Commission (R. 148-151), in which the general nature of the dispute was given as "Whether Illinois or Wisconsin has jurisdiction in my case" (R. 150). A settlement contract, dated November 3, 1943 (R. 151-154), filed with the Illinois Industrial Commission on November 29, 1943, and approved December 3, 1943 (R. 186), contained this provision: "This settlement does not effect any rights that applicant may have under the Workmen's Compensation Act of the State of Wisconsin" (R. 152). On November 29, 1943 (R. 162), Kopp filed with the Illinois Commission a petition for lump sum (R. 137, 155-157), and on December 3, 1943 (R. 137), the Illinois Commission held a hearing on said petition (R. 137-140, 163-168) and allowed the lump sum (R. 167). On December 7, 1943, full payment was made of compensation due under the Illinois Compensation Act (R. 134, 137, 141, 159-160), and on January 10, 1944, the Illinois Industrial Commission issued a formal lump sum settlement order (R. 161-162).

Thereafter E. E. McCartin and Continental Casualty Company, by their attorneys, filed an amended answer to the application pending before the Wisconsin Industrial Commission setting forth as a special defense that under the full faith and credit clause of the Constitution of the United States proceedings under the Wisconsin Act were barred by the award and payment under the Illinois Workmen's Compensation Act (R. 117-120).

The Wisconsin Industrial Commission held a hearing on February 24, 1944 (R. 121); and on March 9, 1944, the Attorney General's Office of Wisconsin addressed a letter to the said Commission making a claim for contribution to the

"state fund" under the provisions of sec. 102.59 of the Wisconsin Statutes (R. 133). On April 18, 1944, an examiner for said Industrial Commission entered an interlocutory award ordering the payment of certain benefits, but giving credit for the sums paid under the Illinois Compensation Act and making certain reservations, among them the question of payment to the "state fund," until determination of the permanent impairment of vision (R. 120-129). The said Industrial Commission affirmed the order of the examiner on May 15, 1944 (R. 129-132).

An action to review the Wisconsin Industrial Commission's order was commenced in the Circuit Court for Dane County, Wisconsin (R. 111-114), and that Court on November 20, 1945, entered a judgment setting aside the order and award of the Industrial Commission (R. 101-111, 172-173). On appeal therefrom by the Industrial Commission of Wisconsin, Leo Thomas Kopp, and State of Wisconsin, in accordance with the Wisconsin Statutes, the Supreme Court of the State of Wisconsin on April 12, 1946, rendered its decision and judgment affirming the judgment of said Circuit Court, basing its decision and judgment on the authority of *Magnolia Petroleum Co. v. Hunt*, 320 U. S. 430.

Specification of Errors

The Wisconsin Supreme Court erred in finding and holding that under the facts of this case the full faith and credit clause of the Constitution of the United States precluded a recovery under the Workmen's Compensation Act of Wisconsin.

Summary of Argument

I. Decision in *Magnolia Petroleum Co. v. Hunt*, 320 U. S. 430, is inapplicable because award of compensation in Illinois in effect reserved rights to additional compensation under Wisconsin Workmen's Compensation Act.

II. Decision in *Magnolia Petroleum Co. v. Hunt*, 320 U. S. 430, expressly reserved consideration of case where the state making first award (as in the present case) would allow compensation notwithstanding previous award in another state.

III. Provision in Wisconsin Compensation Act for payment of $75 into State Treasury for "second injury" fund in cases of specified injuries distinguishes present case from *Magnolia Petroleum Co. v. Hunt*, 320 U. S. 430.

IV. *Magnolia Petroleum Co. v. Hunt*, 320 U. S. 430, should be overruled or limited as to application, because it is contrary to generally recognized rules in compensation cases, and exception to full faith and credit requirements should be made in compensation cases.

ARGUMENT

I. DECISION IN *MAGNOLIA PETROLEUM CO. v. HUNT*, 320 U. S. 430, IS INAPPLICABLE BECAUSE AWARD OF COMPENSATION IN ILLINOIS IN EFFECT RESERVED RIGHTS TO ADDITIONAL COMPENSATION UNDER WISCONSIN WORKMEN'S COMPENSATION ACT.

The settlement contract entered into in Illinois between E. E. McCartin, the employer, and L. T. Kopp, the injured employee, contained the following provision: "This settlement does not effect any rights that applicant may have

under the Workmen's Compensation Act of the State of Wisconsin" (R. 152). This reservation in Illinois of rights under the Wisconsin Compensation Act was manifestly the result of an understanding between the parties that payment under the Illinois law would not preclude the assertion of rights under the Wisconsin law. The Director of Workmen's Compensation for the Wisconsin Industrial Commission, prior to the making of the settlement agreement, notified by letter the Continental Casualty Company, Mr. McCartin's insurance carrier, that the Commission had informed Mr. Kopp that he was entitled to proceed under the Illinois Act and then claim compensation under the Wisconsin Act with credit to be given for the amount paid under the provisions of the Illinois Act (R. 168); and the attorney who later signed the settlement agreement on behalf of the employer (R. 154), answered by a letter in which he stated, *inter alia*, that the Commission's letter had been referred to him for reply and that:

> * * * We understand from your advices that if we make payments to Kopp under the Illinois Workmen's Compensation Act, for the loss of his left eye, you, in the event you make an award to Kopp under the Wisconsin Act for the same injury, will credit your award with the amount paid to Kopp under the provisions of the Illinois Act. With this understanding, we are proceeding to pay Kopp compensation under the provisions of the Illinois Act" (R. 170-171).

Under the Illinois law, the said settlement contract (R. 151-154), which had been approved by the Illinois Commission (R. 186), became in "legal effect an award." *Hartford Accident Co. v. Indus. Com.*, 320 Ill. 544, 546 (1926). Approval was necessary under § 23 of the Illinois

Workmen's Compensation Act (§ 160 of ch. 48, Ill. Rev. Stat. 1943), which provided in part:

> "No employee, personal representative, or beneficiary shall have power to waive any of the provisions of this Act in regard to the amount of compensation which may be payable to such employee, personal representative or beneficiary hereunder except after approval by the Industrial Commission."

The approved settlement contract, then, became in legal effect an award reserving rights under the Wisconsin Compensation Act.

The reservation of rights under the Wisconsin Compensation Act was not eliminated by an application and order for lump sum payment. Under the provisions of § 9 of the Illinois Compensation Act (ch. 48, §146, Ill. Rev. Stat. 1943),

> "Any employer or employee or beneficiary who shall desire to have such compensation, or any unpaid part thereof, paid in a lump sum, may petition the commission, asking that such compensation be so paid, and if, upon proper notice to the interested parties and a proper showing made before such commission or any member thereof, it appears to the best interest of the parties that such compensation be so paid, the commission may order the commutation of the compensation to an equivalent lump sum, which commutation shall be an amount which will equal the total sum of the probable future payments capitalized at their present value upon the basis of interest calculated at three per centum per annum with annual rests: * * *."

The petition for lump sum filed by the Illinois Commission (R. 155-157) was for "commutation of the compensa-

tion" (R. 156)—and it was necessarily for commutation of the compensation due according to the settlement contract. At the December 3, 1943, hearing before the Illinois Industrial Commission on the petition for lump sum, the commissioner, addressing Kopp, stated in part:

> "* * * If you are concerned about the Workmen's Compensation Act in Wisconsin they have a provision in there this Settlement does not affect any rights the Applicant may have under the Compensation Act of the State of Wisconsin. * * * I do not know what it might mean, what your rights are in the State of Wisconsin—I do not know whether the Wisconsin Act provides for any increase where it has been already closed out in another state, I do not know but that provision is in there. What it is worth I am in no position to advise you. I sit only as a member of the Industrial Commission of the State of Illinois. I do not know what the Wisconsin Act is. I do not know what rights you have under the Wisconsin Act, if any. I can't say you will be protected there, I do not know" (R. 139-140).

Mr. Kopp replied in part: "I will take chances on Wisconsin" (R. 140). The final receipt signed by Mr. Kopp acknowledged the receipt of $2,112 "in full settlement of compensation under the provisions of the Illinois Workmen's Compensation Act" (R. 159-160).

The order for lump sum (R. 161-162) was not a determination of rights and obligations under the Illinois Compensation Act; it changed no provisions in the settlement contract except the rate of payment. Neither expressly nor by implication did it eliminate the reservation in the settlement contract concerning rights which Kopp might have under the Wisconsin Compensation Act.

In *Magnolia Petroleum Co. v. Hunt*, 320 U. S. 430, a Louisiana resident hired in Louisiana sustained an injury in Texas. This Court held that a final award of compensation under the Texas Compensation Act precluded a subsequent award in Louisiana under the Louisiana Compensation Act, although credit was given for the amount of the Texas award. The result was based on Article IV, Section 1 of the Constitution, which provides:

> "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof,"

and the implementing Act of Congress:

> "* * * And the said records and judicial proceedings, so authenticated, shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the State from which they are taken" (Act of May 26, 1790, c. 11, 1 Stat. 122, as amended, 28 U. S. C. § 687).

The present case is distinguishable, because instead of a final award in Illinois purporting to dispose of all liability arising from the industrial accident which occurred in Wisconsin, there was an award in Illinois which reserved rights under the Wisconsin Compensation Act. Unlike the Texas award, the Illinois award with a reservation of rights under the Wisconsin Compensation Act, did not dispose of all claims arising from the industrial accident, but only claims arising and adjudicable under the Illinois law. In Illinois

the binding effect of the award was limited by the terms of the award. Neither in Illinois nor in Wisconsin did the Illinois award affect rights under the Wisconsin Compensation Act. When Wisconsin awarded additional compensation under the provisions of the Wisconsin Act, giving credit for the amount paid under the Illinois award, it accorded to the Illinois award the same faith and credit as it had in Illinois. Thus the Wisconsin award was in compliance with the requirement that a compensation award "be given the same effect as res judicata in another state as it has in the state where rendered" (*Magnolia Petroleum Co. v. Hunt*, 320 U. S. 430, 441).

Even if the provision in the settlement agreement concerning rights under the Wisconsin Act should not be considered as an integral part of the Illinois award, the agreement in itself would be sufficient to authorize proceedings under the Wisconsin Compensation Act. Assuming that only one cause of action arose from the accident, with remedies provided by both Wisconsin and Illinois, the compensation claimant had the privilege of splitting his cause of action with the consent of the employer and his insurance carrier.

In *Magnolia Petroleum Co. v. Hunt*, 320 U. S. 430, 444, this Court stated that the plaintiff "cannot split up his claim and '*a fortiori* he cannot divide the grounds of recovery.' *United States v. California & Oregon Land Co.*, 192 U. S. 355, 358." However, as stated in 1 Am. Jur., Actions, § 101, pp. 484-485:

> "The rule that a cause of action may not be split into two or more causes of action is a rule for the benefit of the party defendant; he may agree to a splitting of the cause of action, and in such case the courts will respect the agreement, or he may waive his right to

insist upon the rule forbidding the splitting of a single cause of action. * * *

"Even though the defendant has not agreed to a splitting of the cause of action, his conduct may have been such as to require the plaintiff to split the cause of action to obtain complete justice, in which case the court will permit the cause to be split.".

This is in accord with the exception contained in § 62 of the "Restatement of the Law of Judgments," where one of the exceptions to the rule against splitting the cause of action is "(c) where the defendant consented to the splitting of the plaintiff's cause of action" (p. 243). Under Comment "*m*" which relates to this clause, the Restatement states in part:

"The purpose of the rule stated in this Section is to protect the defendant from being harassed by several actions based upon a single cause of action. It is not applicable where the defendant consents, in express words or otherwise, to the splitting of the cause of action.

"* * *" (p. 257).

In signing the settlement agreement, with the provision regarding rights under the Wisconsin Act, the employer agreed that the employee might split his cause of action. Not only had the employee been informed of his rights to proceed under the Wisconsin Compensation Act notwithstanding an award in Illinois (R. 168), but the employer, by his insurance carrier, announced his intention of paying under the Illinois law with the understanding that credit would be given for a subsequent Wisconsin award (R. 170-171). Even if some elements of an estoppel

are lacking, the employer by his representation to the Wisconsin Commission waived any privilege he might have had of urging that payment under the Illinois law precluded proceedings under the Wisconsin Compensation Act. The inclusion in the settlement agreement of the provision that the settlement agreement "does not effect any rights that applicant may have under the Workmen's Compensation Act of the State of Wisconsin" (R. 152) crystallized the employer's undertaking into an award, in legal effect a judgment, expressly reserving rights to pursue the remedy under the Wisconsin Compensation Act notwithstanding payments under the Illinois Compensation Act.

II. DECISION IN *MAGNOLIA PETROLEUM CO. v. HUNT*, 320 U. S. 430, EXPRESSLY RESERVED CONSIDERATION OF CASE WHERE THE STATE MAKING FIRST AWARD (AS IN THE PRESENT CASE) WOULD ALLOW COMPENSATION NOTWITHSTANDING PREVIOUS AWARD IN ANOTHER STATE.

In *Magnolia Petroleum Co. v. Hunt*, 320 U. S. 430, 443, this Court said:

> "* * * We have no occasion to consider what effect would be required to be given to the Texas award if the Texas courts held that an award of compensation in another state would not bar an award in Texas, for as we have seen, Texas does not allow such a second recovery."

The Texas law (Texas Rev. Civ. Stat., Title 130, Art. 8306, § 19) provides "that no recovery can be had by the injured employee hereunder in the event he has elected to

pursue his remedy and recovers in the state where such injury occurred."

Sec. 5 of the Illinois Compensation Act (ch. 48, § 142, Ill. Rev. Stat. 1943) defines the term "employee" as used in the Compensation Act, as including, among others:

> "Second—Every person in the service of another under any contract of hire, express or implied, oral or written, including persons whose employment is outside of the State of Illinois where the contract of hire is made within the State of Illinois * * *."

Thus under the Illinois Compensation Act, where the contract of hire is made in Illinois, the Illinois law expressly applies, although the employment is outside of the state.

In *Severin v. Industrial Commission,* 363 Ill. 217, 2 N. E. (2d) 65, 66 (1936), the court said:

> "* * * The Workmen's Compensation Act does not cover injuries sustained outside of Illinois where the contract of employment is entered into outside of this state. Smith-Hurd Ann. St. c. 48, § 142, subd. 2, Cahill's Rev. Stat. 1933, c. 48, p. 1379, par. 205, § 5, subd. 2. We have repeatedly held that the Industrial Commission had no jurisdiction in cases where the injuries were sustained outside of the state unless the proof showed a contract of employment in Illinois. Beall Bros. Supply Co. v. Industrial Comm., 341 Ill. 193, 173 N. E. 64; Johnston v. Industrial Comm., 352 Ill. 74, 185 N. E. 191; Kennedy-Van Saun Mfg. & Engineering Corporation v. Industrial Comm., 355 Ill. 519, 189 N. E. 916; Cole v. Industrial Comm., 353 Ill. 415, 187 N. E. 520, 90 A. L. R. 116."

See, also, *Miller v. Yellow Cab Co.,* 308 Ill. App. 217, 31 N. E. (2d) 406, 410 (1941), where the contract of em-

ployment was made in Texas, the injury occurred in Illinois while the employee was a passenger in a Yellow cab, and compensation was paid under the Texas law. An action was brought in Illinois against the Yellow Cab Company. The Illinois court held that such action could be maintained in Illinois because the Texas compensation act permitted suit against a third party tort feasor.

Cf. Biddy v. Blue Bird Air Service, 374 Ill. 506, 30 N. E. (2d) 14 (1940).

Under the Illinois law compensation is payable in that state only where the contract of employment is made in that state. If the contract is made in Illinois, compensation is payable in that state no matter where the injury occurs. Where the contract is made in Illinois, payment of compensation under the law of some other state would not, therefore, extinguish compensation rights under the Illinois law. No case has been found in which Illinois has held that an award in the state where the accident occurred prevented a subsequent award in Illinois where the employment contract had been made. In view of the Illinois rule, it is difficult to see how the courts of that state could hold that an award in the state in which the injury occurred would bar an award in Illinois, where the employment contract had been entered into. In the present case, for example, Kopp had a right to compensation in Illinois, because he had entered into the employment contract in that state; that right in Illinois could not be affected by the fact that Wisconsin, the state in which the injury occurred, also gave him a right to compensation. Conceding the possibility that Illinois *might* rule that pursuing the Wisconsin remedy constituted a renouncing of rights under the Illi-

nois law; apparently Illinois has not so ruled, and there is no statutory provision (as there was in Texas) preventing recovery in case the injured employee recovers compensation in the state in which the injury occurs. The instant case, then, presents squarely the situation expressly not passed upon in *Magnolia Petroleum Co. v. Hunt*, 320 U. S. 430.

As long as the Illinois law would not bar a recovery in Illinois notwithstanding a prior award in Wisconsin, an award in Illinois should not bar an award in Wisconsin under the Wisconsin Compensation Act. This proposition is supported by more than comity between the states. See *Milwaukee County v. White Co.*, 296 U. S. 271, 272 (1935), and cases there cited. When one state asserts the power to award compensation under its own law, notwithstanding a prior award under the law of some other jurisdiction, it characterizes the limited nature of its own awards. It recognizes its own award as not disposing of all claims arising from an industrial accident, either on the assumption that the one accident created distinct causes of actions in each state or on the theory that both states have concurrent jurisdiction. If, for instance, Texas awarded compensation regardless of a prior award in another state, a reconciliation of that policy with the requirements of full faith and credit would compel the conclusion that a Texas award was res judicata in Texas only as to rights accruing under the Texas law, and not as to rights recognized by Texas as accruing under the laws of other states. The scope and legal consequences of the Texas award would be the same whether the limitations were imposed by statute, judicial construction, or necessary implication—or by agreement of

the parties that recovery could be had under the laws of each state granting a cause of action.

The result in *Magnolia Petroleum Co. v. Hunt*, 320 U. S. 430, 442, was reached primarily because:

> "* * * The Texas award, being a bar to any further recovery of compensation for respondent's injury, is, by virtue of the full faith and credit clause, exclusive of his remedy under the Louisiana Act."

If, however, the Texas award by express terms or by necessary implication had limited itself to liability arising under the Texas law with recognition of enforcible rights under the laws of other states, it is respectfully submitted a different result would have been reached by this Court. The case would then have been controlled by *Ohio v. Chattanooga Boiler & Tank Co.*, 289 U. S. 439, 443 (1932), where this Court said:

> "* * * But, as construed and applied by the highest court of Tennessee, the statute does not preclude recovery under the law of another State. And the full faith and credit clause does not require that greater effect be given the Tennessee statute elsewhere than is given in the courts of that State."

And so in the present case where the Illinois award purported to dispose only of those rights arising under the Illinois law, with implied, as well as express, reservation to the compensation claimant of his rights under the laws of Wisconsin, Wisconsin accorded the award the same effect that it had in Illinois. Hence the Wisconsin award, which gave credit for the amount paid under the Illinois award (R. 123, 131) was not violative of the full faith and credit clause or the implementing congressional enactment.

III. PROVISION IN WISCONSIN COMPENSATION ACT FOR PAYMENT OF $75 INTO STATE TREASURY FOR "SECOND INJURY" FUND IN CASES OF SPECIFIED INJURIES DISTINGUISHES PRESENT CASE FROM *MAGNOLIA PETROLEUM CO. v. HUNT*, 320 U. S. 430.

Under the provisions of subsec. (1) of sec. 102.59, Wis. Stats. 1943, "If an employe has at the time of injury permanent disability the equivalent of 15 per cent or more of permanent total disability," he is paid additional compensation from "the funds provided in this section." Subsec. (2) of sec. 102.59, Wis. Stats. 1943, provided in part as follows: "In case of the loss or of the total impairment of a hand, arm, foot, leg, ear or eye, the employer shall be required to pay seventy-five dollars into the state treasury." Subsec. (3) of sec. 102.59, Wis. Stats. 1943, provided that "The moneys so paid into the state treasury, with all accrued interest, is hereby appropriated to the commission for the discharge of all liability for special additional indemnity accruing under this section."

The duty is placed on the Attorney General to "represent the state in all cases involving payment into or out of the state treasury under the provisions of subsection (3) of section 20.07, and sections 102.49 and 102.59" (subsec. (1) of sec. 102.64, Wis. Stats. 1943). The purpose of the "second injury" provisions of the Wisconsin Compensation Act is to eliminate discrimination against the employee who had previously lost an eye, ear, hand, arm, foot or leg, when he comes to seek re-employment, and to secure to an employee suffering the total impairment of a second member such indemnity as is commensurate with the seriousness of the injury. It should be noted that Illinois also has

a "second injury" fund (Illinois Workmen's Compensation Act, § 7 (e); § 8 (e) 20 and (f); Ill. Rev. Stat. 1943, ch. 48, § 144 (e); § 145 (e) 20 and (f)). Louisiana, however, does not appear to have a "second injury" fund, and hence *Magnolia Petroleum Co. v. Hunt*, 320 U. S. 430, could give no consideration to a compensation act which provides not only for payments to the injured employee, but also for payments into a state fund.

Although it was undisputed that Kopp "had total impairment of his left eye for industrial use," the ultimate impairment of vision, if removal of the cataract were attempted, "is unknown" (R. 122); consequently the Industrial Commission of Wisconsin reserved the question of payment to the State Fund "until determination of the permanent impairment of vision" (R. 123). If there should be total impairment of vision, the employer would be obligated to pay $75 into the Wisconsin State Treasury. This potential obligation to the Wisconsin "state fund" was not adjudicated in Illinois, for that state was free to apply its own Compensation Act rather than the Compensation Act of Wisconsin (*Alaska Packers Asso. v. Industrial Acci. Com.*, 294 U. S. 532 (1935)). Besides, the Illinois Industrial Commission, an administrative body, had authority to apply only the Illinois law.

In *Magnolia Petroleum Co. v. Hunt*, 320 U. S. 430, 440, this Court pointed out that "Texas is without power to give extraterritorial effect to its laws." No Illinois statute could project beyond the territorial limits of that State so as to prevent the State of Wisconsin from enforcing an obligation which arose in Wisconsin and which Wisconsin had jurisdiction to enforce. An Illinois statute which provided that no employer paying compensation under the Illinois

law should be obliged to comply with laws of Wisconsin regarding payments into a state fund, would obviously be ineffectual. And yet, if in the present case the award in Illinois should be held res judicata or controlling on Wisconsin under the full faith and credit clause, then the Illinois award exerted an extraterritorial influence denied to statutes and destroyed a right which the State of Wisconsin had in its sovereign capacity.

In *Williams v. North Carolina*, 325 U. S. 226, 230 (1945), this Court said:

> "* * * But those not parties to a litigation ought not to be foreclosed by the interested actions of others; especially not a State which is concerned with the vindication of its own social policy and has no means, certainly no effective means, to protect that interest against the selfish action of those outside its borders."

This language is applicable to the present case: the State of Wisconsin, which was not a party to the proceedings in Illinois, should not be foreclosed from vindicating its social and economic interests in requiring payments into its "second injury" fund where employees subject to the Wisconsin Compensation Act suffer the total impairment of specified organs.

The right of the State of Wisconsin to insist on payments into a state fund, notwithstanding an award in another state, was considered by the Wisconsin Supreme Court in *Interstate Power Co. v. Industrial Comm.*, 203 Wis. 466, 234 N. W. 889 (1931). The employee, who lived with his parents in Iowa, was hired in Iowa but was fatally injured in Wisconsin, whereupon his parents entered into a settlement agreement under the compensation act of Iowa.

The Industrial Commission of Wisconsin then ordered payment of $1,600 (corrected by judgment of circuit court to $1,000) into the State Treasury in accordance with sec. 102.09 (4m) (f), Wis. Stats. 1923, which read as follows:

> "In each case of injury resulting in death, leaving no person wholly dependent for support, the employer or insurer shall pay into the state treasury such an amount, when added to the sums paid or to be paid on account of partial dependency, as shall equal four times the deceased employe's average annual earnings, such payment to the state treasury in no event to exceed one thousand dollars."

In upholding the award of payment in Wisconsin, the Wisconsin Supreme Court said:

> "In dealing with the contentions made in this case, it is necessary first briefly to dispose of the question of jurisdiction. On this point we entertain no doubt that the state of Wisconsin has jurisdiction to regulate the conduct of industries within the state, and to prescribe as one of the conditions upon which performance of an out-of-state contract of hiring shall be permitted in this state, compliance with the provisions of the Wisconsin workmen's compensation act. *American Radiator Co. v. Rogge*, 86 N. J. L. 436, 92 Atl. 85, 94 Atl. 85, cited with approval in *Chicago, R. I. & P. R. Co. v. Lundquist*, 206 Iowa, 499, 221 N. W. 228" (203 Wis. 474).

* * *

> "It is contended by the appellant that the disposition of this case in Iowa has the force and effect of a judgment, to which this court must give full faith and credit. This might be a valid argument provided the Iowa court had any jurisdiction to effect proceedings

under the Wisconsin act. We think it has not such jurisdiction. We concede the jurisdiction of the Iowa commission to determine the rights of the parties under the Iowa act, and we claim the jurisdiction of the Wisconsin commission to determine their rights under the Wisconsin act" (203 Wis. 478).

Mr. Justice Douglas said in his concurring opinion in *Esenwein v. Commonwealth*, 325 U. S. 279, 282 (1945):

"* * * The problem under the full faith and credit clause is to accommodate as fully as possible the conflicting interests of the two States."

See, also, *State Farm Mutual Auto Ins. Co. v. Duel*, 324 U. S. 154, 159-160 (1945).

If Illinois by awarding compensation under its Act can nullify the right that the State of Wisconsin has to certain payments into its "state fund," there is no reconciliation of the conflicting interests. Instead, the interests of Illinois are protected to the point where they obliterate the interests of the State of Wisconsin. It is submitted that no authentic conflict occurs in the interests of Wisconsin and Illinois if Wisconsin retains jurisdiction to order payment into the "state fund" notwithstanding a prior award of compensation in Illinois. And similarly, but perhaps to a lesser degree, no conflict occurs if Wisconsin may, not only order payment into the "state fund," but may also order the payment to the injured employee of the amount due as compensation under the Wisconsin Act, but giving credit for the amount paid under the Illinois award.

IV. *MAGNOLIA PETROLEUM CO. v. HUNT*, 320 U. S. 430, SHOULD BE OVERRULED OR LIMITED AS TO APPLICATION, BECAUSE IT IS CONTRARY TO GENERALLY RECOGNIZED RULES IN COMPENSATION CASES, AND EXCEPTION TO FULL FAITH AND CREDIT REQUIREMENTS SHOULD BE MADE IN COMPENSATION CASES.

In the dissenting opinions of Mr. Justice Douglas and Mr. Justice Black, and the concurring opinion of Mr. Justice Jackson, cogent reasons are advanced against the correctness of the opinion of this Court in *Magnolia Petroleum Co. v. Hunt*, 320 U. S. 430. Without repeating the arguments, it is respectfully suggested that the opinions be considered incorporated into this brief in support of the contention that *Magnolia Petroleum Co. v. Hunt*, 320 U. S. 430, should be overruled, or at least limited as to application. The arguments here presented are intended as elaboration rather than repetition.

The majority opinion in *Magnolia Petroleum Co. v. Hunt*, 320 U. S. 430, indicated that § 403 of the Restatement of Conflict of Laws was intended "as nothing more than a statement of local rules of conflict of laws when unaffected by the full faith and credit clause" (footnote, p. 441). It is respectfully submitted, however, that the Restatement rule was intended to cover the general question of full faith and credit. The American Law Institute Proceedings, Vol. X, indicates that Mr. Wickersham, referring to "Section 440. Effect of Two Acts Governing Injury" and "Section 441. Effect of Previous Award," said:

> "The note is: 'It was, the Advisers believe, surprising to most lawyers when the first decision was made that the compensation acts of two states might

apply to the same injurious event. The question seems to be now settled in favor of the double liability by authority." The question is what is the general opinion of the bar on that subject?

"Member: Should there be a qualification of the subject that if the second state allows suit to be brought, they might limit the recovery.

"Mr. Beale: That is in the next Section, Section 441. As I understand it, the second state gives its award just as if there had been no prior award. They give that award and they then subtract from it anything that has actually been received by the claimant as a result of proceedings in another state or, as we had it in a Massachusetts case a while ago, as the result of private arrangement in another state" (pp. 76-77).

The fact that § 401 of the Restatement of Conflict of Laws "Abolition of Right of Action for Common Law Tort or Wrongful Death" considers under Comment "*b*" the "*Effect of Constitution of United States,*" justifies the conclusion that §§ 402 and 403 were also adopted with full consideration of the requirements of full faith and credit.

Moreover, the rule as stated in § 403 of the Restatement of Conflict of Laws has received general approval. Professor Beale in his Conflict of Laws, Volume Two, § 403.1 (1935), said:

"**Recovery after Recovery Abroad.**—Recovery may be had on the Act of the place of hiring although the injured person has already recovered, either on the Act or at common law, or has made composition, in the state of injury. After recovery in one state, suit may be brought in the other state; but in the judgment credit should be given for the amount already recovered" (pp. 1327-1328).

In "Workmen's Compensation and the Conflict of Laws —the Restatement and Other Recent Developments," by Ralph H. Dwan, 20 Minnesota Law Review 19, 41 (1936), Professor Dwan referred to § 403 of the Restatement, and then stated:

> "This is the only sensible way of handling the problem, and there is considerable authority to support it."

A note in 57 Harvard Law Review 242 (1943-1944), on "Conflict-of-Laws Provisions in Workmen's Compensation Acts," based on a paper written by Mr. Paul Deutschkron, former judge of the Court of Appeals in Stettin, Germany, states:

> "*Effect of a Previous Award.*—If the local act is applicable to intrastate injuries regardless of where the contract of employment is made or the regular employment is carried on, the injured worker may find a double remedy available. Apart from statutory or constitutional prohibition, it has been generally recognized that in such cases the workman may seek recovery under both acts, or under either act. In fact, it is not unusual for an employer after recovering an award in one state, to institute proceedings in another forum when he learns that the law of that state permits a higher compensation. An award under the local act of one state is not res judicata in a proceeding in another state, since it is based upon a compensation act different from the one upon which the new proceedings are grounded, but the recovery is limited to the highest amount that the workman would be entitled to receive under the act most favorable to him. Only one statute gives clear expression to this view, which is almost universally adopted by the courts of other jurisdictions, although several indicate that this result should be reached" (pp. 246-247).

The Supreme Court of Wisconsin, before the publication of the Restatement of Conflict of Laws, held that an award of compensation in another state did not preclude recovery in Wisconsin (*Interstate Power Co. v. Industrial Comm.*, 203 Wis. 466, 234 N. W. 889 (1931)), and when following that holding in a later case, referred to § 403 of the Restatement of Conflict of Laws (*Salvation Army v. Industrial Comm.*, 219 Wis. 343, 263 N. W. 349 (1935)). See opinion of Wisconsin Supreme Court in the instant case (R. 182-183; 248 Wis. 570, 572, 22 N. W. (2d) 522 (1946)).

Legal writers generally have expressed the opinion that the rule in *Magnolia Petroleum Co. v. Hunt*, 320 U. S. 430, constitutes a departure from the established rule in compensation cases. As stated by Samuel B. Horovitz in his recent treatise on "Injury and Death Under Workmen's Compensation Laws" (1944):

> "* * * This decision astounded experts on compensation. It flies in the face of many well-considered state decisions; it violates section 403 of the American Law Institute, Restatement of Conflicts of Laws; it negatives the works and treatises of many experts on the subject; and it will raise havoc with the future of compensation for workers who must traverse state lines" (p. 40).
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> See, also, pp. 40-44, *ibid.*

In comments on "Local Policy in the Conflict of Laws" in 38 Illinois Law Review 384, 390-391 (1943-1944), in considering *Magnolia Petroleum Co. v. Hunt*, 320 U. S. 430, it is stated:

> "* * * In this case, it reversed the Louisiana courts and restricted the workman to a single recovery by

requiring strict adherence to the full faith and credit clause. The authority that existed prior to the Supreme Court's decision was overwhelmingly in favor of allowing the additional recovery. Many state statutes, state court decisions, the opinions of the foremost students of workmen's compensation, and the *Restatement of the Conflict of Laws* all advocated such schemes of recovery similar to the plan followed by the Louisiana courts."

See, also: "Workmen's Compensation Award—Commonplace or Anomaly in Full Faith and Credit Pattern?" by Paul A. Wolkin, 92 U. of Pa. Law Rev. (1943-44), 401, 410-411;

18 Tulane Law Review 509, 512-513, Notes.

Cf. "Reflections on Magnolia Petroleum Co. v. Hunt," by Harold Wright Holt, 30 Cornell Law Quarterly (1944-45), 160;

150 A. L. R. 431 (Annotation on "Award under workmen's compensation act as bar to, or ground for reduction of, claim under act of another state").

The opinion of this Court in *Magnolia Petroleum Co. v. Hunt*, 320 U. S. 430, was predicated in part on the theory that in compensation cases only one cause of action arises from one injury. It is respectfully submitted, however, that one injury may produce two entirely distinct causes of action. Paul A. Wolkin in his article on "Workmen's Compensation Award—Commonplace or Anomaly in Full Faith and Credit Pattern?" 92 U. of Pa. Law Rev. (1943-44) 401, 407, says:

"* * * The decisions in the *Alaska Packers* and *Pacific Employers* cases, conclusively establish that the

workmen's compensation conflict of laws situation is one of the instances in the conflict of laws where more than one state is constitutionally empowered to determine the legal consequences of a single event by the application of its internal law, as distinguished from its conflict of laws rule, governing the subject. The legal justification for this result is the power of each state to determine the consequences of events which transpire within its borders and in which it has a governmental interest. The factual justification is two sets of operative facts, one in each state. Common to both states is the relationship of employer and employee. Peculiar to each is the governmental interest in that relationship as determined by local industrial, social and economic conditions. In one state the relationship was created. In the other state the employee was injured. When, following an injury, the employee seeks compensation, in each state a different coterie of facts superimposed on a common base renders each act applicable. It would thus seem that each state is adjudicating something distinct and that the process of allowing an award in one state is not a determination which precludes an award, predicated on different facts which have not been litigated, in another state."

In *Alaska Packers Asso. v. Industrial Acci. Com.*, 294 U. S. 532, 541 (1935), this Court said:

"* * * the liability under workmen's compensation acts is not for a tort. It is imposed as an incident of the employment relationship, as a cost to be borne by the business enterprise, rather than as an attempt to extend redress for the wrongful act of the employer."

The mere occurrence of an injury in Wisconsin did not give rise to a cause of action in either Wisconsin or Illinois; liability under compensation laws is predicated on liability

without fault—and there is no intimation that the injury in the present case occurred because of any fault of the employer. A cause of action arose in Wisconsin because the Wisconsin Compensation Act imposed an obligation on the employer to make certain payments to the injured employee and the "state fund." Thus a statute-created cause of action arose in Wisconsin. The State of Illinois likewise created a cause of action in Illinois by requiring the employer, who had entered into a contract of employment in that state, to pay certain sums to satisfy the requirements of the Illinois Compensation Act. Thus two statutorily-created causes of action came into existence as the result of one accident. Wisconsin furnished a remedy for the Wisconsin cause of action, Illinois for the Illinois cause of action; and neither state furnished a remedy for the cause of action of the other state. Both states unquestionably had power to impose liability (*Alaska Packers Asso. v. Industrial Acci. Com.*, 294 U. S. 532, 540-541 (1935); *Pacific E. Ins. Co. v. Industrial Acci. Com.*, 306 U. S. 493, 500 (1939)). The causes of action were not mutually exclusive; a determination by Illinois, for instance, of a valid cause of action in that state was not inconsistent with the existence of a valid cause of action in Wisconsin. The situation presented was therefore entirely unlike that considered in *Chicago, R. I. & P. R. Co. v. Schendel*, 270 U. S. 611 (1926), where if the accident occurred in intrastate commerce the Iowa Compensation Act applied, while if it occurred in interstate commerce the Federal Employers' Liability Law applied. In that case there was a cause of action under *either* the Iowa Workmen's Compensation Act or the Federal Employers' Liability Law, but not both. In the present case there was a cause of action in Wisconsin

and a cause of action in Illinois, and neither cause of action was inconsistent with the existence of the other. If the Illinois cause of action is distinct from the Wisconsin cause of action, then, notwithstanding a prior adjudication of the Illinois cause of action, Wisconsin is free to adjudicate its cause of action without violating the full faith and credit clause.

There are potent, practical considerations for holding that one accident may produce multiple causes of action. Cases arise where the employer has insurance coverage in one state and not in another. If an employee should be awarded compensation in the state without insurance coverage, insolvency of the employer might make the award worthless; still, if the award barred further proceedings in the state having insurance coverage, the employee or his dependents would be deprived of all compensation. Moreover, an insurance carrier which collects premiums for the payment of compensation under the laws of State A. should not be relieved from its contractual obligation merely because the employee received an award, possibly uncollectible, in State B. Even if the same insurance carrier covered liability in two states, payment of the award in the state allowing the smaller compensation benefits would not constitute compliance with the obligation to pay the higher benefits allowed in the other state. No injustice results from requiring the insurance carrier to comply with the compensation laws of both states, for the credit given for compensation paid under the first award prevents an imposition of liability in excess of the maximum assumed.

In *Magnolia Petroleum Co. v. Hunt*, 320 U. S. 430, 438, this Court said:

"* * * Even though we assume for present purposes that the command of the Constitution and the statute is not all-embracing, and that there may be exceptional cases in which the judgment of one state may not override the laws and policy of another, this Court is the final arbiter of the extent of the exceptions. *Alaska Packers Assn.* v. *Industrial Accident Comm'n, supra,* 547; *Titus* v. *Wallick, supra,* 291. And we pointed out in *Williams* v. *North Carolina, supra,* 294-295, that 'the actual exceptions have been few and far between. . . .'"

There are persuasive reasons why an exception to the full faith and credit rules should be created in workmen's compensation cases. These reasons are set forth in the scholarly article by Elliott E. Cheatham on "Res Judicata and the Full Faith and Credit Clause: Magnolia Petroleum Co. v. Hunt," 44 Columbia Law Review (1944) 330, 342-345:

"Are there in the setting of this case or in the operation of the Texas judgment any grounds for an exception? If so, it should be firmly based, for the Court is asked to create an exception to a requirement which comes from the Constitution and the federal statute. In recent years the Court has been opposed to encroachments on the rule of full credit. It has struck down some supposed old exceptions and has questioned others."

"When the setting and nature of workmen's com-

"40. It has struck down the defenses of public policy [Fauntleroy v. Lum, 210 U. S. 230 (1908)], of an attempted

pensation are considered, several factors appear which may well be thought to call for exceptional treatment, and four will be mentioned.

"1. The party seeking relief is a member of the necessitous class, injured workmen, which in many branches of our law has received special treatment. The existence of state workmen's compensation statutes with all of their protective measures is the clearest example. In the field of admiralty, the courts developed the beneficent attitude that seamen are wards of the admiralty," and Congress enacted a workmen's compensation statute protecting harbor workers." In dealing with the difficult and much-litigated question as to when a harbor worker comes within the jurisdiction of admiralty and so within the federal statute and when within a state workmen's compensation act, which are mutually exclusive by the terms of the federal statute, the Supreme Court laid down a year ago a rule of reconciliation which seems in the border line

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denial by a state of jurisdiction to its courts over the action on the judgment [Kenney v. Supreme Lodge of the World, 252 U. S. 411 (1920)], of a statute of limitations directed to the original cause of action [Roche v. McDonald, 275 U. S. 449 (1928)], of fiscal cause of action [Milwaukee County v. M. E. White Co., 296 U. S. 268 (1935)]. It has questioned the validity of the defense of penal law. Milwaukee County v. White, *supra*, at 275; Magnolia Petroleum Co. v. Hunt, *supra*, at 213.

"41. The James H. Shrigley, 50 F. 287 (N. D. N. Y. 1892). For application of this attitude, see Calmar S. S. Corporation v. Taylor, 303 U. S. 525 (1938); Socony-Vacuum Oil Co. v. Smith, 305 U. S. 424 (1939).

"42. Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1424 (1927), 33 U. S. C. I. §§ 901 *et seq.* (1940).

cases to uphold relief under either statute.' This result, with possible wide application to situations where the competing federal and state statutes have similar objectives, bears an obvious analogy to the Supreme Court's treatment of usury cases in conflict of laws, for it is a rule in the alternative favoring the party whom the Court believes should be aided."[43a]

"2. Workmen's compensation statutes are addressed to a continuing situation, involving the burden of support of a person unable to support himself, and in this situation the home state of the worker has the special interest which the Supreme Court has many times recognized. An analogous situation is the duty of support owed by father to child, by husband to wife. In the case of father and child, the Supreme Court has held that a judgment of the state of the father's domicil adjudicating and terminating his duty of support must be given full credit in other states, but the court reserved the question of the effect of the judgment if the father later became domiciled in the state of the second forum." Justice Stone in a fine dissent urged the judgment should not be conclusive for the future on a state in which the child later became domiciled, and cited as analogous the cases involving the custody of children whose domicil changes."[45]

"43. Davis v. Department of Labor, 317 U. S. 249 (1942).

"43a. Professor Beale gave his support to special conflict of laws rules for claims of injured employees and applauded 'the emergence of a distinctly sociological jurisprudence in the decisions of the Supreme Court.' Beale, *Social Justice and Business Costs—A Study in the Legal History of Today* (1936) 49 Harv. L. Rev. 593, 608.

"44. Yarborough v. Yarborough, 290 U. S. 202 (1933).

"45. Apparently, it was with this principle in mind that Justice Douglas wrote in his special dissent: 'The most charitable construction is that Texas undertook to adjust

"3. Workmen's compensation proceedings differ in an important respect, as Justice Black points out," from the proceedings in which the court heretofore has considered the effect of a judgment or award. In the ordinary action at law or in equity, the forum may use the law of some other state and give relief in the measure prescribed by that law. This is not true of workmen's compensation in most states, for it is enforced by an administrative commission which will apply only its own statutes. Though the commission may believe another state's connection with the occurrence and the parties is more important than its own, and though it would prefer to give the relief prescribed by the statute of the other state, it can not do so. In the present case the Texas Commission apparently deemed itself unable to give the Louisiana measure of relief even if it wished to do so." So this workman had his claim first adjudicated by a commission which could not give any consideration to his more liberal rights under the Louisiana statute. It may fairly be said, therefore, that he never had the opportunity in that proceeding for a hearing of his full case."

"4. Adherence to the rule of the principal case may give the employer or his insurance company an opportunity for overreaching. The employer is better informed than the employee on the laws of the states. He may press for an early award in the state with the lowest scale of compensation, and thus reduce his obli-

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the rights and duties of the parties and to regulate their relationship only so long as they remained subject to the jurisdiction of Texas.' 64 Sup. Ct. 208, 218.

"46. 64 Sup. Ct. 220.

"47. The rights under the Louisiana statute are enforceable in court. But the Texas commission did not consider those rights could be enforced by it.

"48. Such a factor may keep the rule against splitting a cause of action from applying at all. Restatement,

gation. This shopping around by the employer for the state which will give the employee the least should be made impossible."

"These considerations show that exceptional treatment of workmen's compensation awards may be wise. They have induced the majority of the states which have dealt with the matter to allow a second, supplemental award.[50] It is the function of the Supreme

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Judgments (1942) § 62, after giving the general rule, lists the exceptions to it, one of which is,

> 'except (a) where the procedure adopted by the plaintiff precluded his recovery for the entire claim and this procedure was essential to preserving his rights. . .'

And in Comment *k* to the Section a conflict of laws illustration is given:

> '. . . where a plaintiff brings an action in a State in which the courts have jurisdiction only with reference to one portion of his cause of action, he is not barred from maintaining an action in a proper court for the other portion. Thus, if the defendant enters on the plaintiff's land in one State and cuts and carries off trees, and the plaintiff sues in another State for conversion of the trees, he is not precluded from bringing an action for trespass to the land in the State where the land lies, if he could not have maintained an action for trespass to the land in the State in which the action for conversion was brought.'

"49. There seems to have been no hurried action in the principal case. The final award in Texas was not entered until a year and a half after the injury was suffered. It was, however, pressed to a conclusion at the suit of the insurance carrier, instead of the workman.

"50. The decisions are collected and discussed in the majority and minority opinions in the principal case."

Court to weigh the factors and to determine whether a departure from the usual requirements of full credit is justified."

Conclusion

It is respectfully submitted that the judgment of the Supreme Court of Wisconsin should be reversed.

JOHN E. MARTIN,
Attorney General of Wisconsin,

MORTIMER LEVITAN,
Assistant Attorney General of Wisconsin,
Counsel for Petitioners, Industrial Commission of Wisconsin and State of Wisconsin,

I hereby join in the above brief.

LEO THOMAS KOPP,
Pro Se.